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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SPECIAL REPLY BRIEF FOR PETITIONER

POINT I

The Federal Obscenity Statute (18 U. S. C., Sec. 1461, 62 Stat. 768, 69 Stat. 183) violated the freedom of speech and freedom of the press guarantees of the First Amendment, violated the due process clause of the Fifth Amendment, and violated the First, Ninth and Tenth Amendments in that it improperly invaded powers reserved to the states and to the people.

After reading the various briefs, both by the Government and other counsel, it is submitted that Judge Frank's appendix to his opinion is so thorough and canvasses the subject so well, that we should concentrate upon it.

Although Judge Frank has passed away, this appendix, which might more properly be called a thesis on the factors

> erroneous decisions. The continued utilization of the doctrine, time-honored though it is, is, therefore, not merely without positive merit *but* may present a danger that the real question involved in legislation affecting *speech* will receive inadequate attention. *Whatever the value of the prior restraints doctrine in the past it has outlived its usefulness.*'

A very important point made by Judge Frank is, that the statute as judicially interpreted, authorizes punishment for inducing more thoughts and feelings, or desires.

Reference is made (2309) to the test of obscenity contrived in 1868 by Cockburn, L. J. in *Queens* v. *Hicklin*, 3 Q. B. 360:

> "'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall.' He added that the book there in question 'would suggest * * * thoughts of a most impure and libidinous character.'"

At page 2310, Judge Frank highlights the issue in this case by the following:

> "The test in most federal courts has changed: They do not now speak of the thoughts of 'those whose minds are open to * * * immoral influences' but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of 'the average conscience of the time,' the current 'social sense of what is right.' See, e.g., *U. S.* v. *Kennerly*, 209 F. 119, 121; *U. S.* v. *Levine*, 83 F. 2d 156, 157; *Parmelee* v. *U. S.*, 113 F. 2d 729 (App. D. C.). Yet the courts still define obscenity in terms of the assumed average normal adult reader's

> sexual thoughts or desires or impulses, without reference to any relation between those *'subjective' reactions and his subsequent conduct*. The judicial opinions use such key phrases as this: 'suggesting lewd thoughts and exciting sensual desires'; 'arouse the salacity of the reader,' 'allowing or implanting.' * * * obscene, lewd or lascivious thoughts or desires,' 'arouse sexual desires.' The judge's charge in the instant case reads accordingly: 'It must tend to stir sexual impulses and lead to sexually impure thoughts.' Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings."

The *Kennerly* case was decided on December 1, 1913, and Learned Hand still followed the *Regina v. Hicklin* case. Judge Hand says:

> "That test has been accepted by the law of Federal Courts until it would be no longer proper for me to disregard it." (Quoting cases.)

He criticizes this law, however, saying that it may be consonant with mid-Victorian morals. He does not think we should be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, *supra*.

Judge Frank used the headnotes:

> "No Adequate Knowledge is Available Concerning the Effects on the Conduct of Normal Adults of Reading or Seeing the 'Obscene.'" (2310)
>
> "Effect of 'Obscenity' on Adult Conduct." (2312)
>
> "Effect of Conduct of Young People" (2313)
>
> "The Obscenity Statute and the Reputable Press." (2321)

"The Obscenity Statute and the Newspapers." (2322)

"Available Data Seem Wholly Insufficient to Show that the Obscenity Statute Comes Within Any Exception to the First Amendment."

If the obscenity statute is valid and Congress may constitutionally provide punishment for the mailing of books, evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds—if that be correct, it is hard to understand why similarly, Congress may not constitutionally provide punishment for such distribution of books, evoking mere thoughts or feelings about religion or politics, which Congress considers socially dangerous even in the absence of any satisfactory evidence that those thoughts or feelings would tend to bring about socially dangerous deeds (2325).

The Courts by their own will, have excluded the "classics" from the statute. If the many nude pictures which the defendant transmitted through the mails are obscene, then by merely turning to the reproductions in the articles on painting and sculpture in the Encyclopedia Britannica (14th edition), some of the latter are indistinguishably obscene. Yet these Encyclopedia volumes are readily accessible to everyone, young or old, and are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene."

No one can reconcile the currently accepted test of obscenity with the immunity of such "classics" as *e.g.* Aristophanes' Lysistrata, Chaucer's Canterbury Tales, Rabelais' Gargantua and Pantagruel, Shakespeare's Venus and Adonis, Field's Tom Jones, or Balzac's Droll Stories.

For such "obscene" writings, just because of their great artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

These socalled "classics" now freely circulated by any public library and transported by mail or interstate commerce, did not comport with the average moral attitudes at the time and place of its original publication. The real reason why the Courts have excepted the "classics" from the Federal Obscenity Statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment. This exception —nowhere to be found in the statute—is a judge-made device invented to avoid that absurdity.

In his headnote "How censorship under the statute actually operates" and concludes that "Prosecutors, as censors, actually exercise prior restraint" (2328-2329). He then deals with judges and jurors as censors (2331-2322).

Another point brought out by him is "the dangerously infectious nature of governmental censorship of books" (2333).

"The people should be self-guardians: censorship by public opinion, not by government" (2333).

In speaking of "The seeming paradox of the First Amendment," he says this is unreal; "The Amendment ensures that public opinion—the 'conscience of the time'—shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow."

"Private persons or groups, may validly try to influence public opinion" (2335).

"The fine arts are within the First Amendment's protection" (2335).

"To vest a few fallible men—prosecutors, judges, jurors—with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a 'moral police,' is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans" (2337).

Judge Frank is impressed by "Judge Box's decision as to causal relation to anti-social conduct" (2338).

At 2340 he speaks of "The void-for vagueness argument:" He states:

> "* * * * Now most Courts consider only the assumed impact on the thoughts or desires of the adult 'normal' or average human being." (2340)

A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, e.g., *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; cf. *U. S.* v. *Cardiff*, 343 U. S. 169.

> "There is a stronger argument against the analogy of the 'reasonable man' test: *Even if the obscenity*

> *standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment.* See *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290; *Burstyn Inc.* v. *Wilson*, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218." (2341)

In *Commonwealth* v. *Gordon, et al.*, 66 Pa. District and County Reports (1949), affirmed *sub nom* in *Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A(2) 389 (1950); at page 156 Judge Bok held in connection with Section 524 of the Penal Code of Pennsylvania, which statute forbade the selling * * * or knowingly advertising in any manner, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, etc. It made such act a misdemeanor, and upon conviction such person should be sentenced to imprisonment not exceeding one year or to pay a fine not exceeding $500 or both.

In a fifty-five page opinion Judge Bok characterized by Judge Frank as one of our most reflective judges has researched and carefully analyzed the law as to obscenity.

Judge Bok says:

> "Nowhere in the statute is there a definition of it or a formula given for determining when it exists. Its derivation, ob and scena, suggests that anything done offstage, furtively, or lefthandedly, is obscene. * * * it merely proscribes books that *are* obscene and leaves it to the authorities to decide whether or not they are. This cannot be done without regard to the nature and history of obscenity. It is unlike the fundamental laws of property, of crimes like murder, rape and theft or even of negligence whose meaning has remained relatively constant. That of

obscenity has frequently changed, almost from decade to decade within the past century; 'Ulysses' was condemned by the State Courts in New York just 10 years before it was cleared by Judge Woolsey in the District Court for the Southern District of New York. I must determine what this elusive word means now."

* * *

"No such definition of standard or legislative intention occurs in section 524, and I am convinced that without a declaration of the legislature's intention as to what obscenity means or of what the lawmakers ought to prevent, there is no constant or reliable indication of it to be found in human experience. * * * 'The argument is often made that anyone can tell by instinct what is obscene and what is not, even if it is hard to put the difference into words.' * * * When he was an editor, Walter Hines Page deleted the word 'chaste' because it was suggestive, and the play 'Sappho' was banned in New York City because a man carried the leading lady up a flight of stairs. A librarian once charged Mark Twain's 'Tom Sawyer' and 'Huckleberry Finn' with corrupting the morals of children. In 1907 Richard Strauss's 'Salome' was banned in Boston. Charles Bronte's 'Jane Eyre', when first published, was called 'too immoral to be ranked as decedent literature'. Hawthorne's 'Scarlet Letter' was referred to as 'a brokerage of lust.' George Eliot's 'Adam Bede' was called 'The vile outpourings of a lewd woman's mind'. Others to suffer similarly were Elizabeth Barrett Browning's 'Aurora Leigh', Hardy's 'Tess' and 'Jude', DuMaurier's 'Trilby' and Shaw's 'Mrs. Warren's Profession'. Walt Whitman lost his job in the United States Department of the Interior because of 'Leaves of Grass'.

"It is presumed that Mr. Page and the others who attacked this imposing array of classics could

> tell by instinct what was decent and what was not. The idea that instinct can be resorted to as a process of moral stare decisis reduces to absurdity."

Judge Bok discusses the Constitution question at length citing all cases existing at that time on the subject.

Then the Judge adds:

> "It is not clear to me, nor, I venture to assert, would it be to the Supreme Court, if faced directly by an appropriate case of literary obscenity, what words inflict injury by their very utterance or how such injury is inflicted. As for the notion of an obscene book tending to incite to an immediate breach of the peace, the proper point of emphasis is the breach of the peace. That is different from saying that obscenity automatically tends to a breach of the peace, for the idea is unreal."

Discussing the *Kovacs* v. *Cooper* case and the *Winters* case, in which latter case where the court used language that obscene, lewd, lacivious, filthy, indecent or disgusting —were words well understood thru long use in criminal law etc., Judge Bok said:

> "The difficulty here is that insofar as they apply to literature, obscenity and its imposing string of synonyms do *not* have a fixed meaning through long use in the criminal law—or to put it the other way that they have a very narrow and restricted meaning quite at variance with the assumption that obscenity debauches public morals by a mysteropis and self-exciting process that can be feared but not proved."

Then after discussing the constitutional limitations of the First Amendment and the other constitutional limitations, he comes to the conclusion:

> "I hold that section 524 may not constitutionally be applied to any writing unless it is sexually im-

> pure and pornographic. It may then be applied, as an exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt. The criminal law is not, in my opinion, the custos morum of the King's subjects', as Regina v. Hicklin states: 'it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny'."

In refutation of the Government's claim as to the lack of protection offered by the Constitution to books, writings of any kind, we need only refer to the *Kingsley* case in the New York Court of Appeals, *supra*:

> "There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 501-502; see, also, Chafee, Free Speech in the United States (1941), p. 545), that it protects distribution as well as initial publication (see Lovell v. Griffin, 303 U. S. 444; Grosjean v. American Press Co., 297 U. S. 233), and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas (see Winters v. New York, 333 U. S. 507, 510; Hannegan v. Esquire, Inc., 327 U. S. 146, 153). While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find

> justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting (see Joseph Burstyn, Inc. v. Wilson, supra, 343 U. S. 495, 502-504; Feiner v. New York, 340 U. S. 315, 319; Niemotko v. Maryland, 340 U. S. 268, 271-272; Winters v. New York, supra, 333 U. S. 507, 509; Cantwell v. Connecticut, 310 U. S. 296, 307-308; Thornhill v. Alabama, 310 U. S. 88, 97-98, 105)."

Even in the *Winters* case, 333 U. S. 507, the Court said:

> "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

I wish to emphasize the first point in the brief for petitioner and the main point in his reply brief, namely, that the federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183, violates the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people.

When the framers of the First Amendment provided "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" they meant just that. Further support for this view may be found in the fact that the framers in their thinking insisted on the necessity of an overt act before the government could proceed against an individual. For instance, Thomas Jefferson in his draft of "A Bill for Establishing Religious Freedom", which he introduced into the Virginia Assembly in 1779, and which passed that body in 1785, stated:

> "* * * it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace

and good order * * * * " 2 *The Papers of Thomas Jefferson*, 545, 546 (Boyd ed. 1950); 12 Laws of Virginia, 84, 86 (Hening, 1823).

James Madison took a similar position. In his *Report* on the Virginia Resolutions of 1798, in answer to the argument that libels might tend to insurrections, in effect stated that then the thing to do was to pass laws necessary and proper for the suppression of insurrections. But there were to be no laws abridging freedom of speech or of the press. Madison wrote:

> "Let the question be asked, whether the power over the press exercised in the Sedition Act be found among the powers expressly vested in the Congress. This is not pretended.
>
> Is there any express power, for executing which it is a necessary and proper power?
>
> The power which has been selected, as least remote, in answer to this question, is that 'of suppressing insurrections': which is said to imply the power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them. But it surely cannot, with the least plausibility, be said, that the regulation of the press, and the punishment of libels, are exercises of a power to suppress insurrections. The most that could be said would be that the punishment of libel, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections." 6 The Writings of James Madison, 383, 384 (Hunt ed. 1906).

Mr. Justice Douglas in his dissenting opinion in *Dennis* v. *United States*, 341 U. S. 494 (1951) quoted with approval Jefferson's statement and added in a footnote:

> " * * * Whipple, Our Ancient Liberties (1927), p. 95, states: 'This idea that the limit on freedom of

speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers including John Locke, Montesquieu in his The Spirit of the Laws ("Words do not constitute an overt act"), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson.'" At 590.

There can be no doubt but that the framers of the First Amendment intended that Congress should have no power whatever to abridge the freedom of the press.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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